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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

In re D. S. et al., Persons Coming Under the Juvenile
Court Law.

C086889

SACRAMENTO COUNTY DEPARTMENT OF
CHILD, FAMILY AND ADULT SERVICES,

(Super. Ct. Nos. JD237172,
JD237173)

Plaintiff and Respondent,

v.

K. W.,

Defendant and Appellant.

K. W., father of the minors, D. S. and E. S. (minors), appeals from the juvenile court's order terminating his parental rights and adopting a permanent plan of adoption. (Welf. & Inst. Code,¹ §§ 366.26, 395.) Father contends the juvenile court erred in

¹ Further undesignated sections are to the Welfare and Institutions Code.

denying his motion to grant him reunification services (§ 388) and in failing to apply the beneficial parental relationship exception to adoption (§ 366.26, subd. (c)(1)(B)(i)).

Finding the claims lack merit, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

In April 2016, the Sacramento Department of Health and Human Services (Department) filed a petition to detain D. S., age four, and E. S., age six, from their parents due to parental substance abuse and neglect. The Department began focusing on the family in December 2015 due to a referral that mother M. M., who failed to complete an informal supervision plan, had lost custody of the minors to father but had taken her newborn infant, T. L. (whose father, E. L., is not a party to these proceedings), and returned to father and the two older children, all of whom were living in a motel.³ The referral suggested mother was currently using methamphetamine and breast-feeding the infant. In January 2016, another referral reported mother had returned to E. L., and father went to the residence and became involved in an altercation with E. L. which resulted in significant injuries to both men. In March 2016, the social worker received information mother was using methamphetamine and was again living with father. (*In re D. S.*, *supra*, C082442, p. 2.)

In April 2016, the social worker spoke with mother who said she was ready to get help with her methamphetamine addiction and had been using methamphetamine for the last month. Mother told the social worker father supplied her with methamphetamine and her use escalated to the point where father could not pay his rent. Mother said she was under the influence of methamphetamine while caring for the minors. Mother also said

² Portions of the factual and procedural background are taken from this court's related opinion. (*In re D. S.* (Mar. 29, 2017, C082442) [nonpub. opn.])

³ Mother is not a party to these proceedings and will be discussed only where relevant to the issues on appeal.

E. S. had not been to school during the time they were living in motels. The school confirmed E. S. had not attended school during all of April 2016 and none of her absences were excused. (*In re D. S., supra*, C082442, p. 2.)

After unsuccessful attempts to locate the minors at two different motels, the minors were located at a paternal great-aunt's home and removed from parental custody pursuant to a protective custody warrant. At that time, the paternal grandmother, who acknowledged she had a "drinking problem," was drinking and unsteady, a marijuana pipe was in plain sight on the bed, and the minors were dirty and unkempt. (*In re D. S., supra*, C082442, pp. 2-3.)

When the social worker spoke to the minors, they said the parents smoked "stuff" in the car with them. D. S. identified the "stuff" as "weed." When the social worker told father part of the reason the minors were detained was that he left them with mother, who was using methamphetamine, he responded he could leave the children with anyone he wanted and it was not up to the social worker to tell him who was or was not appropriate. On May 2, 2016, the court ordered the minors detained pending the jurisdiction hearing. (*In re D. S., supra*, C082442, p. 3.)

The jurisdiction/disposition report stated mother admitted caring for the minors while under the influence of methamphetamine. Mother also stated father wanted her around and provided her methamphetamine or assisted her in getting it. Mother further acknowledged her drug use placed the minors at risk of harm. Father denied knowing mother was under the influence of methamphetamine while she was caring for the minors and did not know she had tested positive for methamphetamine in early April 2016. Father explained E. S. missed school because they were living in motels, the maternal grandmother had passed away, and transportation issues. Father agreed mother's drug use placed the minors at risk of harm. Father also agreed he should have known about mother's drug use, but the minors were never harmed and he could see nothing wrong. (*In re D. S., supra*, C082442, p. 3.)

The report stated the social worker had interviewed the minors in May 2016. During the interview, E. S. stated her father “lied” to her about fighting with mother, he had previously said he would not fight with her anymore. E. S. said one time they were fighting in the car and turned up the music so the minors would not hear, but it only made it worse. Another time the family got kicked out of a campground after the parents were fighting and arguing too loudly. On yet another occasion, when D. S. was also present, the father hit the mother in the face. This made E. S. cry as she did not like it when people fought. Both minors had significant aggression issues, both physical and verbal, in the foster home, resulting in a seven-day notice for removal. (*In re D. S., supra*, C082442, pp. 3-4.)

The report indicated mother was beginning her substance abuse treatment plan in May 2016 and had tested positive for marijuana several times in April 2016. Father also completed his assessment but had two positive tests for marijuana in May 2016. The last test result was high because father had been smoking a lot of marijuana. (*In re D. S., supra*, C082442, p. 4.)

The petition was amended in June 2016 to include allegations of mother’s history of substance abuse and her current use of methamphetamine while caring for the minors; father’s use of marijuana that impaired his ability to parent the minors; father’s failure to protect the minors by leaving them in mother’s care when he knew or should have known she was abusing methamphetamine; and domestic violence between the parents that placed the minors at risk. (*In re D. S., supra*, C082442, p. 4.)

At the contested jurisdiction/disposition hearing on June 24, 2016, mother denied several of her prior statements and insisted she got methamphetamine from her parents, not father. Mother denied any domestic violence incidents with father. She also minimized the domestic violence incident where father hit her, claiming she could have been hit in the heat of the moment when she was trying to get past him to leave and he wanted her to stay with him, but she did not remember. Mother said the social worker

twisted her earlier statements and wrote what she wanted in the report. (*In re D. S.*, *supra*, C082442, p. 4.)

Father testified that after they separated in December 2015, mother continued to help him watch the minors. He admitted using marijuana to calm his nerves and straighten out his thought process, but acknowledged he has not had a valid prescription for the past year although he had recently updated it for the next year. He did not recognize mother's substance abuse problem at first, but in the last couple of months saw signs she was using. In April 2016, mother's lies and "tweaker" behavior made him suspect she was using. Father first insisted mother's drug use did not put the minors at risk because he trusted her with them and knew she would not harm them, but later agreed the fact she was under the influence of drugs when caring for the minors did place the minors at risk of harm. Father denied there was any domestic violence in the relationship and denied hitting mother, although he admitted they did argue and raise their voices. Father recognized the allegations of domestic violence were partly based on the minors' statements, but believed they misinterpreted the situations when he and mother were arguing and he was trying to calm her down. Father said he did not intentionally hit mother when she was upset and trying to run out the door. (*In re D. S.*, *supra*, C082442, pp. 4-5.)

The court sustained the petition as amended, finding both parents had substance abuse problems and father's continued marijuana use without a valid medical authorization led to his inability to properly supervise the minors as evidenced, in part, by E. S.'s lengthy absence from school. Further, father knew mother was using methamphetamine while she cared for the minors but permitted her to do so in spite of the risks. Finally, the court sustained the domestic violence allegation based on the minors' statements, as well as the parents' testimony. The court removed the minors from parental care and ordered reunification services. (*In re D. S.*, *supra*, C082442, p. 5.)

Father appealed the juvenile court's June 24, 2016, ruling. This court subsequently affirmed the juvenile court's orders. (*In re D. S., supra*, C082442, pp. 1-2.)

In December 2016, the Department reported that both parents were steadily completing their services. Father completed his domestic violence for offenders counseling and his parenting education services. However, he denied any domestic violence between him and mother. Father's individual therapist suspected father had " 'oppositional disorder towards female authority.' " (Italics omitted.) The therapist said that father would need at least 10 more therapy sessions in order to begin to surmount his mental health issues, which included manic episodes. Father had a valid medical marijuana card and, beginning on May 9, 2016, all of father's drug tests were positive for marijuana. Father ceased testing in August 2016, but was asked to resume testing in October 2016 following a series of instances in which father acted erratic and shouted his responses to the therapist. On October 20, 2016, father was asked to leave the building due to his behavior. At the Department's direction, father again ceased testing on November 29, 2016.

Father consistently expressed his disdain for Child Protective Services (CPS), which he felt was in the business of "selling kids." He stated the minors should not have been taken from him and should be returned to his care, adding he only obliged the case plan because he wanted his children back. Father consistently reported he did not understand why the minors were removed from his care. He stated he would be willing to shield the minors from likely domestic violence but had not shown appropriate boundaries with mother. The Department assessed the risk of returning the minors to either parent as "very high" noting neither parent had yet completed or benefited from services.

The minors were placed in separate foster homes due to their aggressive behaviors toward each other and, as a result, were improving behaviorally and acting out less. The

Department recommended continued out-of-home placement for the minors and continued services to both parents.

The contested prepermanency hearing commenced on January 10 and 17, 2017. The court ordered that the minors remain in out-of-home placement and both parents receive continued reunification services. In particular, the court ordered that father's individual counseling include an anger management component, his case plan include a psychological evaluation to tailor services, and that father be required to test upon suspicion of drug use (with substance abuse treatment stricken from the case plan).

An April 11, 2017, progress report stated that on March 23, 2017, mother reported she and father got into a serious fight during which father made death threats and engaged in physical violence with mother. However, on March 30, 2017, mother recanted, stating she had been untruthful about the incident and was just being spiteful and immature. She denied any domestic violence and apologized to the Department for her dishonesty. Father stated he and mother had a disagreement in his vehicle over mother's reunification goals and mother became very upset. Father stated he was distressed because he had paid for mother's return to California from Washington. He claimed he maintained his composure and asked mother to leave the vehicle and mother obliged.

Mother reportedly tested positive for marijuana and alcohol and stated she had been smoking marijuana with father. She told her recovery specialist she wanted to relinquish the minors to either the Department or father.

Father completed his psychological evaluation. The psychologist, Dr. Cyrus Moazam, reported that father had anxiety that did not impair his daily activities. Dr. Moazam recommended a psychiatric medication evaluation, conjoint counseling with the minors, frequent and random alcohol and other drug testing, and individual counseling.

Father was living at his aunt's house and stated he was having challenges finding housing due to a past eviction on his rental history. The social worker provided him with housing resources and informed him a referral would be placed with Salvation Army transitional housing before recommending return of the minors to his care.

Father had not missed any visits with the minors other than work-related absences. The minors enjoyed visits with father, who played with them and brought them food and toys.

The June 2, 2017, permanency review report stated the minors continued to do well and improved behaviorally in their separate placements. Father completed his domestic violence counseling and parenting education classes and partially completed his individual counseling sessions. Father tested positive for marijuana, but no other drugs, and attended 12-step meetings when he had time. According to Dr. Moazam, father had a polysubstance dependence disorder, anxiety disorder, and custody problems. Dr. Moazam noted that while father could benefit from services, "his frustration tolerance is limited when problems occur."

Father's visitation was reportedly appropriate, although E. S. stated she felt distant from father because "he only cares about [the baby, J. S.]"⁴ (*Italics omitted.*) Father wanted the minors returned to him and was opposed to a permanent plan of adoption.

The Department continued to assess the risk of returning the minors to either parent as "very high" due to the fact that neither parent had completed or benefited from all of the court-ordered services. However, the Department recommended that father be given additional time to participate in reunification services with the goal of eventually placing the minors with him. The Department also recommended continued out-of-home placement for the minors and termination of services to mother.

⁴ J. S., a child of mother and father born during the pendency of, is not a subject of these proceedings. She will be discussed only when relevant.

According to a progress report filed June 16, 2017, father's psychiatrist, Dr. William White, completed father's psychotropic medication evaluation and concluded father's attention deficit hyperactivity disorder (ADHD) could be treated with Adderall. Dr. White stated it was likely father would have other diagnoses but he did not want to overload father with medications, as father was resistant to taking any medication at all.

J. S. was placed in the same foster home as E. S. The caretakers indicated they would eventually be open to placement of D. S. and were willing to begin with visits and then increase to an overnight stay to allow him time to adjust. The caregivers also stated they were willing to provide permanency for the minors through adoption.

The addendum report filed August 2, 2017, stated father was not agreeable to participating in cognitive behavioral therapy. Dr. White reported that father had ADHD and possibly bipolar but was resistant to taking medication. Father confirmed he was taking the prescribed Adderall daily but that he preferred cannabis.

It was reported that during a July 6, 2017 visit, father asked E. S. for the address of the confidential foster home and the license plate numbers of the foster parents' vehicles. When the social worker confronted father and reminded him that the court-ordered confidential placement was to maintain the safety of the minors, father stated it was "a little overdramatic" and "not that big of a deal" (*italics omitted*) that he knew the placement information. Thereafter, father's visits were supervised to protect the confidentiality of the minors' placement.

The Department recommended that father's reunification services be terminated due to his failure to demonstrate an ability to protect the minors. It was noted that father's mental health was "worrisome" given that he acknowledged the medication helped, but he preferred cannabis despite knowing he was at high risk for substance abuse. It was also noted that father continued to maintain inappropriate boundaries with mother, even reporting his desire to marry her. There was also a concern that father had

shown a lack of ability to properly care for the minors as he was extremely reluctant to pursue treatment for his mental health needs, placing the minors at risk if returned to his care.

I

Contested Permanency Hearing

At the August 29, 2017, contested permanency hearing, the court heard testimony from a number of witnesses, including mother and father. The court concluded that, while the parents had made some progress, that progress was insufficient and “too little and too late.” The court noted that father had not benefited from the domestic violence and counseling programs and continued to deny any physical violence in his relationship with mother. Father also failed to acknowledge the impact his volatile relationship with mother had on the minors, as evidenced by the extreme behaviors displayed by the minors. Finding there was a substantial risk of detriment to the minors if returned to either parent, the court terminated services to both parents and set the matter for a section 366.26 hearing.

The November 3, 2017, progress report stated the minors were living in separate placements, but were seeing each other twice weekly in preparation for the eventual placement of D. S. with his sisters, E. S. and J. S. E. S. and D. S. were visiting with father once a week, and D. S. had an additional weekly visit with father. D. S. was reportedly happy to visit father and interacted with him positively. E. S., on the other hand, was observed to be indifferent about her visits with father and occasionally defiant toward him. E. S. reportedly mourned the separation from her family and stated she no longer wanted reunification with her parents. She was, however, happy to visit with D. S. and missed him when they were apart. The Department recommended a slow, cautious transition to conjoint placement of the minors.

On December 1, 2017, father filed a section 388 petition requesting the court change its August 30, 2017, order and return the minors to his care and custody with

family maintenance services or, in the alternative, provide father with additional reunification services. (§ 388.)

The December 2017 selection and implementation report stated that while D. S. continued to have challenging behaviors, those behaviors had decreased in placement. E. S. was adjusting well and improving in her placement and responded well to her caregivers. However, she continued to struggle with wanting to please and support father despite being content in her foster home. The minors continued to visit with each other twice weekly, one visit of which was spent with father. E. S. was assessed as generally adoptable, and D. S. was assessed as specifically adoptable due to his age and behavioral status. The Department initiated a plan to transition D. S. into the same placement as E. S. (and J. S.). It was noted that while father had been engaging in counseling with the minors, his awareness of his own challenges in separating from mother were only very recent.

An addendum report filed January 5, 2018, reported that a temporary four-day placement of D. S. with E. S. was difficult. D. S. reportedly had numerous tantrums and requested to go home to his foster parents. Some of E. S.'s challenging behaviors were also resurfacing when D. S. was present, and E. S. reported to her caregivers that D. S.'s visit reminded her of what life was like prior to removal.

II

Combined Contested Section 388 And Section 366.26 Hearing

The selection and implementation hearing commenced on February 27, 2018, along with the hearing on father's section 388 petition.

A

Teddrisa Byrd (Social Worker)

Teddrisa Byrd, the adoptions social worker assigned to the case, testified that E. S. was very attached and bonded to her caregivers, calling them "Mom" and "Dad" and two other foster children as her sisters, and stated she loved them all. E. S. was also very

bonded to D. S. and became nervous when she was not able to see him. Byrd testified that E. S. was “a different child than when she first came to the Department’s attention.” She no longer exhibited the sexualized behaviors and her aggressiveness was substantially decreased. The foster parents were very calming for E. S., they provided her stability, and they let her know she was loved and cared for.

Byrd testified that D. S. was very bonded to his sister E. S. and said that it would be very detrimental if D. S. were unable to see E. S. D. S. initially exhibited behaviors such as cursing, kicking, ripping papers, being defiant to his teachers, attempting to leave school, and attempting to run from the foster mother’s car. He also climbed on top of counters or the refrigerator and refused to come down. However, while he still continued to kick and curse, he no longer displayed some of the other behaviors. Byrd testified D. S. suffered from feelings of abandonment by his mother, which oftentimes manifested themselves in behavioral issues. According to Byrd, there were no reports that D. S. expressed missing father. Byrd said that D. S. was likely to be adopted and that the plan was to transition him to E. S.’s foster home where the foster parents were fully committed to adopting him and engaging in additional services to facilitate that plan. D. S. expressed a desire to see his sister and wanted to “stay with her forever,” and he “like[d] [E. S.’s] foster parents” and wanted to see them. Byrd stated that although D. S. engaged in therapy with father, it did not focus on the reasons that triggered removal.

Byrd testified that father’s living situation was not a safe environment for the minors because father was living with several other men who were also working on their sobriety, one of whom was unable to obtain a background check clearance. She also noted father told the minors more than once that they were coming home despite having been instructed not to discuss the ongoing proceedings with them.

B

Dania Martinez, Therapist

Dania Martinez, individual therapist to D. S., testified she began seeing D. S. for individual therapy in December 2016, and began seeing father approximately six months later in conjoint counseling. D. S. seemed to be “pretty attached” to father from the start. D. S.’s negative behaviors such as tantrums, angry outbursts, defiance, inability to concentrate, and trouble sleeping increased after counseling sessions with father stopped. Martinez said that the increase in negative behaviors was due to D. S.’s confusion and uncertainty about the changes happening with his family. She also said that D. S. experienced trauma as a result of being removed from his home and perhaps other incidents in his past. Martinez stated she felt D. S. would be adversely affected if he was no longer able to see father and that it would be detrimental to his mental health if parental rights were terminated. However, Martinez acknowledged that father never mentioned he exposed D. S. to domestic violence, D. S. witnessed domestic violence between him and mother, mother smoke drugs while in the presence of the minors, or mother cared for the minors while under the influence. Father also never told Martinez that E. S. stated D. S. was present when father attacked mother. Martinez also acknowledged that domestic violence or substance abuse could impact her opinion on whether termination of parental rights would be detrimental to D. S., noting she did not have information regarding father’s progress on the issues that resulted in removal of the minors.

Martinez stated D. S. had shown progress in his ability to cope with stress and anxiety. He also had the ability to form attachments and had indeed formed an attachment to his foster parent. Martinez was confident D. S. would also be able to form an attachment to E. S.’s foster parents. Martinez stated D. S. mentioned several times that he missed his mother.

C

Letitia Obot, Wellness Recovery Action Plan Facilitator

Letitia Obot, D. S.'s facilitator, testified father attended twice-monthly child and family team meetings and interacted with D. S. She confirmed father was unable to obtain housing due to his limited budget and "something in [his] record."

D

Jean Wilder, Father's Counselor

Jean Wilder counseled father from June 14, 2017 to October 13, 2017. Father made positive strides and showed improvement. Father told Wilder he had been clean and sober for three or four years, but that he used marijuana to deal with his anxiety and to calm down and when he was caring for the minors. Wilder did not find father's use of marijuana problematic despite his long history of using drugs and alcohol. Father told her he eventually began taking prescription medication instead of using marijuana for his anxiety.

Wilder said that father accepted responsibility for CPS's involvement in the case, noting father felt CPS's involvement was due to "[a] lot of instability, not having consistent residences for [the minors], the off-and-on relationship with the mother, and his drug use." Father disclosed to Wilder that mother was a danger to the minors and that he would buy methamphetamine for the mother. Father never disclosed any physical violence in his relationship with mother. At the end of her sessions with father, Wilder recommended that father remain compliant with his medication schedule, continue frequent random testing to ensure sobriety, continue to be monitored by CPS for as long as necessary, become involved in community activities, participate in a recovery program, and participate in family counseling when appropriate.

E

Christopher Prentiss, Outpatient Counselor

Christopher Prentiss, father's individual outpatient counselor, testified he met with father every two weeks beginning September 8, 2017. Prentiss taught classes attended by father, including parenting, "Living in Balance," "Seeking Safety," and social support. All classes except the parenting class are rooted in substance abuse. Father was scheduled to graduate from the program in March 2018, and complete the mandatory aftercare program in July 2018. Prentiss also counseled father one-on-one, discussing father's progress and goals in his treatment plan to stay clean and sober.

Father discussed the problems in his relationship with mother, stating he was very codependent and his main issue was his boundaries with mother. Prentiss did not have any concerns about father's sobriety given father's participation in 180 days of treatment. Prentiss acknowledged, however, that father continued to use marijuana "as prescribed," something Prentiss would not recommend. Father never told Prentiss, and Prentiss was unaware, that father was supplying mother with methamphetamine, that father paid for mother to come from Washington to California to stay in a motel with father, or that father allowed mother to care for the minors while high on methamphetamine. Prentiss was aware of the domestic violence between father and mother; however, father stated he hit mother only once.

F

Francisco Chavez, D. S.'s Special Education Teacher

Francisco Chavez, D. S.'s special education teacher since August 2017, testified D. S. was involved in an education program focused on academic, behavior, and social skills support, which was designed to help students academically and behaviorally and to get them the coping skills necessary to regulate their behavior in order to mainstream them as soon as possible. Chavez testified that prior to October 2017, D. S. used more of his coping skills. However, after a break in the program in October and November, his

behavioral issues worsened. For example, Chavez testified D. S.'s patience got shorter, he exhibited inappropriate behaviors (such as pushing or hitting a peer, cussing, or not following staff directions), and he had more and more incidents each passing day. That is, "he's done more unsafe behaviors in a single day and exhibited shorter fuses in dealing with things than when he first started." After Christmas, D. S.'s behavior "got really, really bad," including longer tantrums, more complaining, and refusal to do things academic and nonacademic. On February 27, 2018, D. S. became frustrated and tried to climb the fence and escape from school. He also exhibited assaultive behaviors toward staff, including Chavez. Chavez also witnessed D. S. being assaultive toward his foster parent, punching his foster mother in the jaw. In the latter part of February 2017, D. S. was suspended from school after he became frustrated and undressed himself down to his underwear before staff intervened. D. S. expressed frustration with his parents and that he missed his mom and his family. He also expressed that he was upset because he could not see his father. Chavez testified that the frequency of D. S.'s aggressive behavior had increased and his ability to cope had decreased. He further testified that D. S.'s behaviors had been "extremely troubling" because they created dangerous situations and were extremely inappropriate. D. S. had, on occasion, exhibited self-injurious behaviors. Chavez testified those behaviors increased after Christmas 2017. D. S. expressed that he was upset and acted out because he did not get to visit father, he missed his mother, and he had not visited his family. The foster mother made consistent contact with Chavez, kept him informed about D. S.'s emotional state, and followed up with him after school to see how D. S. was doing.

G

James Shaw, Visitation Supervisor

James Shaw testified he provided transportation to and from visits and observation during visits between parents and children. Shaw observed visits between father and E. S. (and occasionally D. S.). Visits began in March 2017 and were twice weekly for

two hours until approximately one month before the hearing, when visits were decreased to once weekly and then once monthly. Visits were generally positive. E. S. would occasionally have “meltdowns” during visits, which father quickly resolved. D. S. had “meltdowns” more frequently and they tended to be more intense. Father also helped to calm D. S. down. Both minors were excited and happy when father arrived at the visits. Father interacted with the minors during visits, helped E. S. with her homework, played with the children, and brought them food. On occasion, E. S. became frustrated because she did not want the visit to end.

H

April Gollnick-Licenik, Father’s Counselor

April Gollnick-Licenik testified she provided counseling to father for domestic violence, “gaining insight into behaviors,” and anger management from November 2017 to January 2018. Father discussed his codependency and verbal domestic violence with mother. He showed insight into the domestic violence by expressing what happened and taking ownership, but did not mention any physical domestic violence within the relationship. Father stated he did not want a relationship with mother and recognized it was an unhealthy relationship.

When discussing why CPS became involved, father stated it was his relationship with mother and his failure to protect the minors. While they discussed the history of substance abuse, Gollnick-Licenik was unaware of whether substance abuse was a factor in the minors’ removal. She was also unaware of whether father used drugs other than marijuana or supplied mother with drugs, or that mother used methamphetamine while caring for the minors, things father never admitted. It was Gollnick-Licenik’s understanding the removal was a result of “not investing more in the relationship” and “failing to protect the [minors] from mother’s substance abuse.” Gollnick-Licenik was aware of the allegation of domestic violence, and particularly of father slapping mother, something father denied. Gollnick-Licenik was unaware that the court found the

allegation true. She was also unaware that the court found true an allegation that father punched mother in the face, giving her a black eye. Gollnick-Licenik acknowledged that her counseling report indicated only “failure to protect” as the reason for CPS involvement in the case.

I

Ebony Sylvester, Social Worker

Ebony Sylvester testified that father completed cognitive behavioral therapy counseling in October 2017. He requested and completed drug court as part of the minors’ sibling’s case. Sylvester participated in a case conference meeting in January 2018. Father’s progress in drug court was discussed, as was the fact that he was testing clean. Sylvester discussed in the meeting that father had done every service asked of him -- eight or nine of which were for the minors’ case as opposed to their sibling’s case -- and had exhibited positive change. Out of the services completed for the minors, father completed individual counseling. However, Sylvester observed that father progressed at times and regressed at times, noting father appeared to be interested in mother’s whereabouts despite having stated mother was not the healthiest person for him and he was “done with her.”

J

Father

Father testified he had supervised visits with E. S. and D. S. twice weekly from August through December 2017. Visits with E. S. were reduced to once a week in January 2018, then once every other week in February 2018, then once a month in March 2018. Visits with D. S. were reduced to once a week in January 2018, and then once a month in February 2018. E. S. was very excited to see father, running up to him, jumping into his arms, and giving him a hug. She played with father and watched movies and was sad when the visits ended. She told father she missed being home and missed the family.

D. S. was also excited to see father and the two played together during visits. D. S. became very upset when visits ended, crying and sometimes throwing a tantrum. On numerous occasions and most recently on March 7, 2018, father promised the minors he would never stop fighting for them, despite having been told not to promise the children anything and not to discuss the case with them.

Father testified he first met mother in February 2009 and the two were together when both minors were born. Mother lived elsewhere for approximately one and one-half years, after which father allowed her to come back because he thought she was clean and sober and she was helping support the minors. Between May 2016 and January 2017, father and mother tried to make their relationship work until J. S. was born, then broke it off when mother left for Seattle in 2017. Father paid for mother to return to Sacramento. Then, mother left again sometime in September 2017.

The last time father personally spoke with mother was September 16, 2017 when mother called requesting him to e-mail pictures of the minors. Father refused and told mother he wanted no contact with her. Father denied he knew or wanted to know mother's current location, claiming he had no interest in contacting someone who "can abandon their kids as she has and not do what is necessary for her kids."

Father testified that prior to CPS involvement, he was the minors' primary caregiver. He stated his relationship with the minors was very close and he felt the minors were his "best friends." In father's opinion, CPS became involved in 2016 because of his failure to protect the minors from their mother, his failure to do his job as a parent by putting the minors in danger with mother, his marijuana use, and the domestic violence between him and mother. He admitted mother was using methamphetamine daily while taking care of the minors, but denied that he and mother used methamphetamine together, stating he had not used methamphetamine since May 2013. He admitted, however, that he smoked marijuana while D. S. was in the room.

Father denied any physical violence between him and mother, and specifically denied ever slapping mother or giving her a black eye. He also denied a substantiated referral by CPS in July 2013 that he engaged in domestic violence with his own mother. He did, however, admit to domestic violence with his sister in 2013 when he hit his sister in the face and gave her a black eye while the minors were present.

When asked what he thought the cause of D. S.'s behavioral issues were, father testified it was "learned behavior" such as arguing and throwing things and feeling alone.

Father acknowledged having completed an outpatient drug treatment program prior to this case. He stated the longest period of time he had abstained from using illegal drugs, including marijuana, was a year and one-half when mother was gone in 2013. He started using marijuana shortly after mother reentered his life.

Since August 2017, father completed drug court, an outpatient drug treatment program, a domestic violence victim class, a parenting class, and cognitive behavioral therapy counseling, and he participated in weekly counseling with D. S. He stated he had been compliant with drug court for 181 days and was never noncompliant. He last used marijuana on June 9, 2017, when he began taking prescription Adderall for his ADHD.

Father stated his current roommates were in substance abuse recovery and had been clean, one for at least three years. He testified he rectified his previous housing problem (i.e., a prior eviction that went to collections) enabling him to obtain housing.

K

Michael, Foster Father to E. S.

E. S.'s foster father, Michael, testified that E. S. had been in his care since February 2017. Her sibling, J. S., was also placed with him in April 2017. There were two other foster children in the home as well. Michael stated he was interested in adopting E. S. and J. S. He became interested in adopting D. S., as well in June or July 2017, after seeing the minors interact with one another. The foster home was approved for adoption. Michael stated the minors' love for one another was obvious and they

enjoyed spending time together. He saw no sign of physical fighting between the two in his home other than verbal arguments, which usually occurred when D. S. did not get what he wanted.

The foster father first met D. S. in March 2017, approximately one month after E. S. was placed in the home. The court appointed special advocate wanted to initiate weekend visitation between D. S. and E. S. and brought D. S. over to the foster home, initially for 10 to 15 minutes but eventually for increased periods of time. In August 2017, the advocate began dropping D. S. off at Michael's home for several hours so that the foster parents could get to know D. S. better.

Over Christmas 2017, the minors had an extended overnight visit at the foster home. Michael explained the visit was difficult because it was the first extended visit with D. S., who presented a lot of defiance toward authority in general. However, when the foster family sat D. S. down and waited out his tantrums together, D. S. was able to calm himself down and talk through the problem. Michael also stated it was overwhelming for D. S. because there were a lot of foster family members around. Mainly, D. S. had meltdowns when everyone was not playing with him or did not do what he wanted to do. After repeated screaming tantrums, D. S. ended up leaving early after stating multiple times he did not want to be there and he wanted to go home to his foster family. However, after every tantrum, D. S. expressed his desire to stay in Michael's home.

Michael testified that, whenever D. S. went into meltdown mode, E. S. tended to revert back to the way she behaved when she was first placed in Michael's home -- she had tantrums every couple of days, yelling and screaming and kicking the wall. E. S. had greatly improved and was only having tantrums once a month. She learned how to calm herself down and remove herself from the situation. E. S. told Michael that D. S.'s presence in the home sometimes reminded her of "how it was before, and she doesn't like that." While D. S. had some struggles and E. S. "kind of regresses" when the two were

together, Michael stated he still wanted to adopt them both because it was important to keep the minors together.

Michael testified that after Christmas 2017, visits returned to daily visits and then, once services were in place, slowly transitioned back to an overnight. At the suggestion of the Wellness Recovery Action Plan specialist and the therapist, Michael and his wife met D. S. for lunch without any other children present. D. S. had no tantrums and no problem eating his food or leaving the restaurant. He enjoyed the visit and suggested they do it every other week. Wellness Recovery Action Plan services for Michael, his wife, and D. S. began in February 2018.

Although Michael was concerned about D. S.'s behaviors, particularly at school, he felt that most of D. S.'s problems were due to confusion, a lack of stability, and a lack of family. Michael stated he remained committed to D. S. despite his challenging behaviors. D. S. called Michael "Dad" and Michael's wife "Mom." Michael hoped to have D. S. move in with them permanently within 45 days.

L

Ted Lambert, Court Appointed Special Advocate For D. S.

Ted Lambert was the advocate for D. S. and his wife was the advocate for E. S. Both he and his wife had been advocates for the minors for just over one year. Lambert saw D. S. three to four times per month. Whenever Lambert picked up D. S. for a visit, D. S. would usually ask if he was going to see his sister and whether they were going to E. S.'s foster parents' house. D. S. was always very excited to see E. S. They ran toward each other and gave each other a big hug. D. S.'s attitude toward E. S.'s foster parents was positive, as were his visits with them. After some of his visits with father, D. S. was a little bit aggressive, upset, or defiant. On the other hand, his behavior after seeing the therapist was much more positive; D. S. was very self-aware and he listened.

D. S. talked to Lambert about life with his parents, noting father had taken him to see R-rated movies and he occasionally had lucid dreams after father told him a story.

D. S. also spoke to Lambert about a story involving mother's ex-boyfriend, Evan, who hit father with a hanger and then went to jail.

M

Juvenile Court Ruling On Section 388 Motion

The juvenile court denied father's section 388 petition stating there was no change in circumstances and it would not be in the minors' best interests. First, the court noted father's reunification services were terminated in August 2017. The court found that while father had made some changes, he "waited far too long" to begin abstaining from marijuana despite having been encouraged to do so many times throughout the proceedings. The court noted father was only beginning to take prescription medication to address his mental health issues, he refused to acknowledge his addiction and resisted services related to substance abuse, he failed to accept responsibility for the impact his addiction and mother's addiction had on the minors, and he refused to acknowledge and take responsibility for his physical violence against mother. While father was "inching along to more insight" and making some progress, his progress represented "changing circumstances not changed circumstances." Finally, the court found father failed to prove it would be in the minors' best interest to delay permanency and stability in favor of giving father more time to provide for their safety and emotional needs.

N

Juvenile Court Ruling On Section 366.26

The court concluded both minors were specifically adoptable and likely to be adopted if parental rights were terminated. The court noted both minors experienced trauma early on due to the parents' drug use and domestic violence. The minors exhibited behavioral issues when first taken into protective custody two years prior, which behaviors the court found to be related to their earlier trauma and not necessarily tied to the reduction in visits with father. While E. S.'s behaviors were improving, D. S. seemed to take two steps forward and one step back. The court said that a big factor in

D. S.'s behavioral struggle was not having had contact with mother since summer 2017 and being "tormented by the uncertainty of his future." Nonetheless, the court found the minors were meeting developmental milestones and progressing appropriately for the ages.

With regard to the beneficial parental relationship exception, the court found father maintained regular and consistent visitation with both minors. The court further found that while E. S. struggled with loyalty to father, she no longer recognized father as her parent, she expressed ambivalence about being placed in his care, and she consistently stated she wanted to remain with her foster parents, whom she referred to as "Mom" and "Dad." As to E. S., the court concluded, "While [E. S.] might be saddened by the absence of her father, I cannot find it would be beneficial for her to continue the relationship with her father at the expense of losing the stability she would no doubt receive in a permanent home. Her relationship with her father, at this point, I find is more akin to a loving friendship, not a parent-child relationship that would suffer if severed. I do not find that the parental bond exception applies."

The court found D. S. had a connection with father, but did not find that emotional attachment to be positive. The court further found father had yet to take ownership in the minors' trauma, noting the lifestyle of substance abuse and violence to which father exposed D. S., and the fact that father was, until approximately eight months ago, still using marijuana, still communicating with mother, and still not treating his mental health needs. In concluding the benefit D. S. received from his relationship with father was outweighed by the benefit he would receive in the stability and permanence of adoption by the foster family, the court considered the abuse, neglect, and emotional upheaval in D. S.'s prior relationship with father, and father's current mental health issues (including the fact that father only began engaging within the past eight months), as well as the relationship between D. S. and E. S., which the court found to be "much stronger" than D. S.'s bond with father.

Finding the benefit of continuing D. S.’s relationship with father was outweighed by the benefit of adoption, the court concluded the parental relationship exception did not apply and terminated father’s parental rights.

DISCUSSION

I

Denial Of Section 388 Petition

Father contends the juvenile court abused its discretion in denying his section 388 petition requesting the court provide him with additional reunification services.⁵ He claims the court failed to adequately consider the significant positive changes he made to maintain his sobriety, make changes to his attitude, and take responsibility, as well as positive changes exhibited by D. S. until visits with father were reduced.

“To prevail on a section 388 petition, the moving party must establish that (1) new evidence or changed circumstances exist, and (2) the proposed change would promote the best interests of the child.” (*In re J.T.* (2014) 228 Cal.App.4th 953, 965.) The change of circumstances or new evidence “must be of such significant nature that it requires a setting aside or modification of the challenged prior order.” (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 485; see also *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1451.) When reunification services have been terminated and a section 366.26 hearing has already been set, a court assessing the child’s best interests must recognize that the focus of the case has shifted from the parents’ interest in the care, custody, and companionship of the child to the needs of the child for permanency and stability. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) The child’s best interests “are not to further

⁵ Father’s claim focuses solely on his request for additional reunification services. Therefore, our discussion of his claim will focus on only that request and will not address the portion of his section 388 petition seeking return of the minors to his care and custody.

delay permanency and stability in favor of rewarding” the parent for his or her “hard work and efforts to reunify.” (*In re J.C.* (2014) 226 Cal.App.4th 503, 527.) “A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child’s best interests.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) We review for abuse of discretion a juvenile court’s denial of a section 388 petition. (*In re J.T.*, *supra*, 228 Cal.App.4th at p. 965.)

It is undisputed that in the months prior to the hearing, father made progress by ceasing his use of marijuana, maintaining sobriety, participating in counseling and other services, and demonstrating some understanding of his mental health issues. However, as the juvenile court pointed out, father’s progress came only after reunification services were terminated in August 2017 and father was at risk of having his parental rights terminated. Despite having made changes in some of the behaviors that led to removal of the minors, father failed to acknowledge his own drug addiction or take responsibility for the impact both parents’ addictions had on the minors. Similarly, he refused to acknowledge his perpetration of physical violence against mother, oftentimes in the presence of the minors, or the lasting trauma such violence had on the minors’ prior and current behaviors. The court did not err in finding father failed to establish changed circumstances.

Further, the minors were removed on April 26, 2016. Father filed his section 388 petition requesting additional reunification services on December 1, 2017, well after the 18-month statutory limit provided in section 361.5, subdivision (a)(3)(A). While father asserts a juvenile court always has the inherent power to make rulings that are in the best interests of the minors regardless of statutory deadlines, the court expressly found that providing additional services would delay permanency for the minors and would not be in their best interests.

The juvenile court did not abuse its discretion in denying father's section 388 petition.

II

The Beneficial Parental Relationship Exception

Father contends the juvenile court erred in failing to find the beneficial parental relationship exception applied to the minors. (§ 366.26, subd. (c)(1)(B)(i).) He claims the evidence clearly established his bond with D. S. and the fact that termination of that bond would result in the extreme behaviors D. S. had already exhibited when visitation was decreased.

If the juvenile court finds the child adoptable, it must terminate parental rights unless it would be detrimental to the child. (*In re L.S.* (2014) 230 Cal.App.4th 1183, 1199.) Termination of parental rights may be detrimental to the minor when “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) “Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) We review with deference a juvenile court’s rejection of an exception to adoption. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315 [whether the standard of review is deemed substantial evidence or abuse of discretion, broad deference to the lower court is required]; *Jasmine D.*, *supra*, at p. 1351 [abuse of discretion]; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576 [substantial evidence].)

To prove the beneficial parental relationship exception applies, “the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits -- the parent must show that he or she occupies a parental role in the life of the child.” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.) Moreover, it is not enough

simply to show “some benefit to the child from a continued relationship with the parent, or some detriment from termination of parental rights.” (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1349.) “[T]he parent must show that severing the natural parent-child relationship would deprive the child of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed.” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

Here, father’s regular visitation with the minors was undisputed. However, father did not meet his burden of showing the minors’ bond with him was so significant and positive that it would outweigh the well-being the minors would gain in a permanent home with new, adoptive parents. E. S. had been with her foster family since February 2017, along with her sibling, J. S., who was placed there two months later. E. S. was attached and bonded to her caregivers and called them “Mom” and “Dad.” She expressed her love for her foster family. Her caregivers calmed her and provided her with stability, and she looked to them for care and support. Although E. S. loved father, she expressed indifference and defiance toward him during some of her visits, and she struggled with wanting to please and support him. She also expressed that she no longer wanted reunification with her parents. Permanence for E. S. was imperative, as demonstrated by the fact that over time in the home of her caregivers, she showed great improvement with her behavioral issues and learned how to calm herself down and remove herself from difficult situations.

While the record indicates D. S. also had a bond with father, enjoyed visits with him, and interacted positively with him, D. S. was sometimes aggressive, upset, and defiant after visiting with father. On the one hand, father engaged and played with D. S. during visits, which D. S. enjoyed. On the other hand, father discussed the case and attempted to obtain confidential information about the foster parents, causing D. S. confusion and requiring that subsequent visits be supervised.

D. S.'s visits with and attitude toward E. S.'s foster parents were positive. He expressed his fondness for E. S.'s foster parents and his desire to see them. D. S. was also very bonded to E. S. and expressed a desire to see her and "stay with her forever." He was also attached to his own foster parent. When he became overwhelmed after an extended overnight visit at E. S.'s foster home, he asked to go home to his foster family, not to father. While D. S.'s foster parent was not willing to adopt D. S., E. S.'s foster parents were willing and there was confidence D. S. would eventually be permanently placed there with his two siblings.

D. S.'s special education teacher Chavez noted a marked decline in D. S.'s behavior beginning in October 2017 and escalating through February 2018, including an attempt to escape from school with aggressive and assaultive behavior toward Chavez, staff, and D. S.'s foster parents. Father asserts the deterioration in D. S.'s behavior was the direct result of the decrease in visitation with father. The record shows otherwise. While D. S. periodically became upset when he could not see father, the decline in his behavior was attributed primarily to his confusion and uncertainty about the changes happening with his family, his lack of stability, his feelings of abandonment by mother, and the fact that he was frustrated with his parents and missed his mom and his family. On the whole, however, D. S.'s challenging behaviors decreased in foster placement. His time with a therapist resulted in more positive behavior and self-awareness and the efforts and patience of his foster parents and E. S.'s foster parents continued his behavioral change for the better.

Substantial evidence supports the order terminating father's parental rights.

DISPOSITION

The orders of the juvenile court are affirmed.

/s/
Robie, J.

We concur:

/s/
Hull, Acting P. J.

/s/
Murray, J.